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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT TACOMA

9 RAYMOND A.,  
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v.  
Plaintiff,

CASE NO. C22-5387-TLF

12 COMMISSIONER OF SOCIAL SECURITY,  
13  
14                   Defendant.

ORDER AFFIRMING DEFENDANT'S  
DECISION TO DENY BENEFITS

15 Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of the  
16 Commissioner's denial of Plaintiff's application for disability benefits. Pursuant to 28  
17 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties  
have consented to proceed before the undersigned Magistrate Judge.

Having considered the ALJ's decision, the administrative record (AR), and all  
memoranda of record, this matter is AFFIRMED.

I. BACKGROUND

Plaintiff filed an application for Disability Insurance Benefits (DIB) on November  
22, 2016, alleging disability beginning April 1, 2013. AR 13. After the application was  
denied at the initial level and on reconsideration, Plaintiff requested a hearing before an

1 Administrative Law Judge (ALJ). On October 10, 2018, the ALJ held a hearing and took  
2 testimony from Plaintiff and a vocational expert (VE). AR 29–60. On December 6, 2018,  
3 the ALJ issued a decision finding Plaintiff not disabled. AR 13–24. The Appeals Council  
4 denied Plaintiff's request for review on January 10, 2020, making the ALJ's decision the  
5 final decision of the Commissioner. AR 1–6; see 20 C.F.R. § 404.981. Plaintiff appealed  
6 the denial of disability benefits to the United States District Court for the Western District  
7 of Washington. On May 7, 2021, the Court reversed and remanded the ALJ's decision for  
8 further administrative proceedings. AR 418–32.

9 On January 4, 2022, the ALJ conducted a new hearing and took testimony from a  
10 VE. AR 395–412. Plaintiff did not provide testimony during the January 4, 2022 hearing.  
11 AR 401. On January 26, 2022, the ALJ found Plaintiff not disabled. AR 373–88. In this  
12 Court, Plaintiff challenges the ALJ's January 26, 2022 decision that found Plaintiff was  
13 not disabled, and contends the Commissioner's denial of disability benefits should be  
14 reversed.

## 15                           **II. STANDARD OF REVIEW**

16 Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner's denial  
17 of disability benefits if it is based on legal error or is not supported by substantial evidence  
18 in the record. See *Woods v. Kijakazi*, 32 F.4th 785, 788 (9th Cir. 2022). “Substantial  
19 evidence” means “more than a mere scintilla” but only “such relevant evidence as a  
20 reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*,  
21 139 S. Ct. 1148, 1154 (2019) (citation and internal quotation marks omitted). If there is  
22 more than one rational interpretation, one of which supports the ALJ's decision, the Court  
23 must uphold the ALJ's decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

### 1                   **III. THE ALJ'S FINDINGS**

2         The Commissioner follows a five-step sequential evaluation process for  
3 determining whether a claimant is disabled. See 20 C.F.R. § 404.1520.

4         At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity  
5 during the period from the alleged onset date through March 31, 2017, the date last  
6 insured. AR 375.

7         At step two, the ALJ found Plaintiff has the following severe impairments:  
8 degenerative disc disease of the lumbar spine with a history of laminotomy/discectomy in  
9 July of 2015; left Haglund's deformity; bilateral sensorineural hearing loss; and obesity.  
10 AR 375. The ALJ also found the record contained evidence of hypertension and  
11 hyperlipidemia; however, the ALJ found these conditions did not rise to the level of severe.  
12 AR 376.

13         At step three, the ALJ found Plaintiff does not have an impairment or combination  
14 of impairments that meet or equal the criteria of a listed impairment. AR 376–78.

15         At step four, the ALJ found Plaintiff had the residual functional capacity (RFC) to  
16 perform work through the date last insured with the following limitations:

17                   the claimant was limited to standing and/or walking for no  
18 more than 4 hours a day and can sit for a total of 4 hours a  
19 day. The claimant was able to lift and carry up to 20 lbs. on an  
20 occasional basis and up to 10 lbs. on a frequent basis. He is  
21 further limited to no more than frequent balancing, and to no  
22 more than occasional stooping, crouching, crawling, kneeling  
23 or climbing. He would also be limited to no more than frequent  
bilateral reaching, handling or fingering. He would need to  
avoid concentrated exposure to temp extremes, vibrations,  
unprotected heights, moving machinery and similar hazards.  
He would need to avoid exposure to excessive noise.

AR 378. With that assessment, the ALJ found Plaintiff unable to perform any past relevant

1 work. AR 387.

2 At step five, the ALJ found Plaintiff is capable of making a successful adjustment  
3 to other work that exists in significant numbers in the national economy. AR 388. With the  
4 assistance of a VE, the ALJ found Plaintiff capable of performing the requirements of  
5 representative occupations such as cashier, storage facility rental clerk, and router, which  
6 jobs require light exertion as defined in 20 C.F.R. § 404.1567(b). AR 387–88.

#### 7 IV. DISCUSSION

8 Plaintiff raises the following issues: (1) Whether the ALJ properly evaluated the  
9 medical evidence; (2) whether the ALJ properly evaluated Plaintiff's testimony; and (3)  
10 whether the ALJ properly assessed Plaintiff's RFC and properly based the step five  
11 finding on that RFC assessment. Plaintiff requests remand for an award of benefits or, in  
12 the alternative, remand for further administrative proceedings. The Commissioner argues  
13 the ALJ's decision has the support of substantial evidence and should be affirmed.

##### 14 1. Medical Opinion Evidence

15 The regulations applicable to Plaintiff's case require the ALJ to weigh medical  
16 opinions regardless of the source. 20 C.F.R. § 404.1527(c). Under these regulations, the  
17 ALJ is required to give "controlling weight" to a treating physician's opinion if it is "well-  
18 supported by medically acceptable clinical and laboratory diagnostic techniques and is  
19 not inconsistent with the other substantial evidence in [the claimant's] case record."<sup>1</sup> *Id.*  
20 § 404.1527(c)(2). More weight should be given to the opinion of a treating doctor than to  
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<sup>1</sup> In 2017, the Social Security Administration amended its regulations and removed the "controlling  
23 weight" requirement for all applications filed after March 27, 2017. See 20 C.F.R. §§ 404.1520c,  
416.920c (2017). Because Plaintiff's claim was filed before March 27, 2017, the new rules are not  
applicable to this case.

1 a non-treating doctor, and more weight should be given to the opinion of an examining  
2 doctor than to a non-examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).  
3 Where not contradicted by another doctor, a treating or examining doctor's opinion may  
4 be rejected only for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d 1391,  
5 1396 (9th Cir. 1991). Where contradicted, a treating or examining doctor's opinion may  
6 not be rejected without "specific and legitimate reasons' supported by substantial  
7 evidence in the record for so doing." *Lester*, 81 F.3d at 830–31 (citation omitted).

8       A. Dr. Derek Leinenbach, M.D.

9           Dr. Leinenbach examined Plaintiff on March 25, 2017, and diagnosed Plaintiff with  
10 chronic lower back pain secondary to lower lumbar spondylosis, polyarthralgia, left  
11 Haglund's deformity, hypertension, and bilateral hearing deficit. AR 277–80. Dr.  
12 Leinenbach assessed Plaintiff with the ability to stand, walk, and sit for four hours in an  
13 eight-hour workday; lift and carry twenty pounds occasionally and ten pounds frequently;  
14 climb, stoop, crawl, and crouch occasionally; and reach, handle, and finger frequently.  
15 AR 280. Dr. Leinenbach further opined Plaintiff should avoid exposure to excessive noise.

16 *Id.*

17           The ALJ afforded Dr. Leinenbach's opinion "great weight," finding the doctor's  
18 assessed limitations to be "supported by the evidence in the medical file and the  
19 assessments of both state agency doctors." AR 385.

20           Plaintiff agrees "Dr. Leinenbach's opinion is indeed the most accurate medical  
21 opinion in the record" but argues "the overall evidence, including [Plaintiff's] testimony,  
22 shows that [Plaintiff] is actually even more limited than opined by Dr. Leinenbach." Dkt.  
23 14, at 3–5. Plaintiff argues for a more restrictive RFC based on other evidence in the

1 record; however, “the key question is not whether there is substantial evidence that could  
2 support a finding of disability, but whether there is substantial evidence to support the  
3 Commissioner’s actual finding that claimant is not disabled.” *Jamerson v. Chater*, 112  
4 F.3d 1064, 1067 (9th Cir. 1997); *see also Rounds v. Comm’r of Soc. Sec. Admin.*, 807  
5 F.3d 996, 1006 (9th Cir. 2015) (“[T]he ALJ is responsible for translating and incorporating  
6 clinical findings into a succinct RFC.”).

7 Here, Plaintiff does not argue the ALJ’s evaluation of Dr. Leinenbach’s opinion  
8 lacks the support of substantial evidence. To the contrary, Plaintiff agrees with the ALJ’s  
9 consideration of the doctor’s opinion.

10 Further, substantial evidence supports the ALJ’s evaluation of Dr. Leinenbach’s  
11 opinion. During the examination, Plaintiff “was able to walk into the examination room and  
12 get on and off the exam table without assistance, remove and replace his shoes without  
13 trouble, and was not in acute distress”; could tandem walk, stand on heels and toes, and  
14 squat without assistance but endorsed low back pain; and had a stable gait, intact grip  
15 strength and manipulative abilities, and full strength in his extremities. AR 381 (citing AR  
16 277–79). The ALJ reasonably determined Dr. Leinenbach’s assessment of “exertional,  
17 postural, manipulative, and noise avoidance limitations . . . are supported by evidence in  
18 the medical file and the assessments of both state agency doctors.” AR 385. Therefore,  
19 substantial evidence supports the ALJ’s evaluation of Dr. Leinenbach’s opinion, and  
20 Plaintiff has not shown the ALJ erred.

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22       B. Non-Examining Opinions

23 Plaintiff argues the opinions of non-examining state agency physicians Dr. Robert

1 Bernardez-Fu, M.D., and Dr. Desmond Tuason, M.D., are entitled to “little weight”  
2 because the doctors’ applied an incorrect legal standard. Dkt. 14, at 7–8. Plaintiff further  
3 argues the doctors’ opinions are entitled to “limited weight” because they did not review  
4 evidence after July 3, 2017. *Id.* at 8. The ALJ gave “partial weight” to Dr. Bernardez-Fu  
5 and Dr. Tuason’s assessments of Plaintiff’s functional capacity, finding the “medical  
6 evidence of record as a whole supports a slightly more restrictive residual functional  
7 capacity, particularly the examination notes of Dr. Leinenbach, who observed slow gait.”<sup>2</sup>  
8 AR 386. Yet, it appears that affording “little weight” or “limited weight” to the doctors’  
9 opinions—as opposed to “partial weight” as the ALJ did here—would not have changed  
10 the outcome of the decision. See *Stout*, 454 F.3d at 1055 (an ALJ’s error may be deemed  
11 harmless where it is “inconsequential to the ultimate nondisability determination”).

12 Indeed, Plaintiff does not argue the ALJ’s evaluation of either Dr. Bernardez-Fu’s  
13 opinion, or Dr. Tuason’s opinions, lacks the support of substantial evidence. To the  
14 contrary, Plaintiff agrees the ALJ properly found the state agency opinions to be not fully  
15 supported by the evidence of record and agrees Dr. Leinenbach’s opinion “is the most  
16 accurate medical opinion in the record.” Dkt. 14, at 4, 7–8. And, the ALJ determined the  
17 evidence supported more restrictive limitations than the doctors’ assessed. See *Johnson*  
18 *v. Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir. 1995) (“[O]verinclusion of debilitating factors  
19 is harmless.”). Therefore, Plaintiff’s argument fails to establish reversible error in the ALJ’s

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23 <sup>2</sup> The ALJ also gave “little weight” to Dr. Bernardez-Fu and Dr. Tuason’s opinions that Plaintiff’s hyperlipidemia and hypertension were severe impairments. AR 386. Plaintiff does not challenge the ALJ’s step two finding.

1 evaluation of Dr. Bernardez-Fu and Dr. Tuason's opinions.

2 **2. Plaintiff's Statements Regarding Limitations**

3 The ALJ must provide specific, clear, and convincing reasons, supported by  
 4 substantial evidence, for rejecting a claimant's subjective symptom testimony.<sup>3</sup> *Trevizo v.*  
 5 *Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017); *Smolen v. Chater*, 80 F.3d 1273, 1286 (9th  
 6 Cir. 1996). An ALJ may reject a claimant's symptom testimony when it is contradicted by  
 7 the medical evidence, but not when it merely lacks support in the medical  
 8 evidence. See *Carmickle*, 533 F.3d at 1161 ("Contradiction with the medical record is a  
 9 sufficient basis for rejecting a claimant's subjective testimony."); *Burch v. Barnhart*, 400  
 10 F.3d 676, 681 (9th Cir. 2005) ("[L]ack of medical evidence cannot form the sole basis for  
 11 discounting pain testimony.").

12 Plaintiff alleges he cannot work due to back and shoulder problems, hearing  
 13 problems, and feet and hand arthritis. AR 173. At the 2018 hearing, Plaintiff testified he  
 14 experienced problems reaching overhead and holding his arm up for any period of time,  
 15 he had substantial back pain from carrying groceries and similar activities, his joints  
 16 swelled and there were nodules from arthritis, and he experienced burning, fatigue, and  
 17 pain from pinched nerves in the lumbar section when walking through the grocery store  
 18 so that he frequently needed to stop to rest. AR 42–44, 59.

19 Plaintiff further testified he needed to change positions between sitting, standing,  
 20 and laying down to avoid getting over-fatigued or burning and stabbing leg pains; he  
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22 <sup>3</sup> Effective March 28, 2016, the Social Security Administration (SSA) eliminated the term  
 23 "credibility" from its policy and clarified the evaluation of a claimant's subjective symptoms is not  
 an examination of character. SSR 16-3p.

1 would not be able to perform a job requiring him to stand for two to four hours; he  
2 experienced burning, fatigue, and pain in his shoulder from repetitive motions, such as  
3 doing dishes or yardwork; he experienced “strange pinching nerve-type pains” in his back,  
4 legs, and feet when tying his shoes; and his hearing problems alienated him from his  
5 family as he struggled to understand his family’s conversation. AR 48–51. Plaintiff stated  
6 that when he worked on chores at home, the right shoulder pain would be anywhere from  
7 six to nine, on a 10-point scale; left shoulder would be six or seven; back pain would be  
8 six or seven for 24-hours per day, seven days per week, with spikes up to a 10. AR 49–  
9 50.

10 The ALJ found Plaintiff’s “medically determinable impairments could reasonably  
11 be expected to cause the alleged symptoms; however, the claimant’s statements  
12 concerning the intensity, persistence and limiting effects of these symptoms are not  
13 entirely consistent with the medical evidence and other evidence in the record.” AR 380.

14 Plaintiff argues the ALJ’s evaluation of Plaintiff’s testimony was improper because  
15 the ALJ did not properly evaluate the objective medical evidence. Dkt. 14, at 9. Plaintiff  
16 has not shown reversible error in the ALJ’s evaluation of the opinions of Dr. Leinenbach,  
17 Dr. Bernardez-Fu, and Dr. Tuason or in the ALJ’s evaluation of the other medical  
18 evidence.

19 Plaintiff summarizes medical records related to Plaintiff’s physical impairments and  
20 argues “all of the above-cited evidence confirms that [Plaintiff] has many impairments  
21 which can reasonably be expected to cause pain.” Dkt. 14, at 4–7. Plaintiff argues this  
22 evidence “provides objective evidentiary support for [Plaintiff’s] testimony about his  
23 symptoms and limitations.” *Id.* at 7. Plaintiff fails to identify any specific error in the ALJ’s

1 evaluation of this medical evidence. The Court “review[s] only issues which are argued  
2 specifically and distinctly in a party’s opening brief.” *Greenwood v. Fed. Aviation Admin.*,  
3 28 F.3d 971, 977 (9th Cir. 1994) (“We will not manufacture arguments for an appellant,  
4 and a bare assertion does not preserve a claim, particularly when a host of other issues  
5 are presented for review.”); *see also Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d  
6 1155, 1161 n.2 (9th Cir. 2008) (declining to address issues not argued with any  
7 specificity). At most, Plaintiff argues for a different interpretation of the medical evidence,  
8 which fails to show reversible error in the ALJ’s equally rational interpretation. See  
9 *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999) (“[W]hen  
10 evidence is susceptible to more than one rational interpretation, the ALJ’s conclusion  
11 must be upheld.”). Therefore, Plaintiff has not shown the ALJ erred when evaluating this  
12 other medical evidence.

13 Even if the ALJ had erred when evaluating this other medical evidence, such error  
14 would be harmless in this case. Plaintiff admits “none of the above treatment providers  
15 stated specific opinions regarding [Plaintiff’s] functional limitations.” Dkt. 14, at 7. An ALJ  
16 is not required to provide clear and convincing reasons for rejecting a medical opinion  
17 that does not identify any specific functional limitations. See *Turner v. Comm’r Soc. Sec.*  
18 *Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (where nothing in a physician’s report  
19 assigns any specific limitations on the claimant, “the ALJ did not reject any of [the  
20 physician’s] conclusions”); *see also Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012  
21 (9th Cir. 2003) (“[T]he ALJ is not required to discuss evidence that is neither significant  
22 nor probative.”).

23 Additionally, the medical records identified by Plaintiff generally relate to Plaintiff’s

1 spine and musculoskeletal symptoms, which the RFC reasonably accounts for -- by  
2 limiting Plaintiff's ability to stand, walk, sit, lift, carry, balance, stoop, crouch, crawl, kneel,  
3 climb, reach, handle, and finger. AR 378. Therefore, any error in the ALJ's evaluation of  
4 this medical evidence would be harmless because none of these medical records identify  
5 any specific functional limitations or describe symptoms that conflict with the ALJ's RFC  
6 determination. See *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir.  
7 2006) (an ALJ's error may be deemed harmless where it is "inconsequential to the  
8 ultimate nondisability determination").

9 Therefore, Plaintiff's argument fails to show error in the ALJ's evaluation of  
10 Plaintiff's subjective symptom testimony.

11 Plaintiff argues the ALJ misapplied the "objective evidence test" by finding the  
12 objective evidence "does not support the alleged severity of his symptoms." Dkt. 14, at  
13 9–10. "While subjective pain testimony cannot be rejected on the *sole ground* that it is not  
14 fully corroborated by objective medical evidence, the medical evidence is still a relevant  
15 factor in determining the severity of the claimant's pain and its disabling effects." *Rollins*  
16 v. *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (emphasis added); see 20 C.F.R. §  
17 404.1529(c)(4) ("Your symptoms, including pain, will be determined to diminish your  
18 capacity for basic work activities to the extent that your alleged functional limitations and  
19 restrictions due to symptoms, such as pain, can reasonably be accepted as consistent  
20 with the objective medical evidence and other evidence."). Here, the ALJ identified  
21 several reasons for discounting Plaintiff's subjective testimony, including finding Plaintiff's  
22 reports of disabling pain were undermined by medical findings, improvement with  
23 treatment, gaps in treatment, and activity level. AR 380–85.

1       The ALJ further found Plaintiff's "subjective complaints of total disability"  
2 undermined by the by the opinion of Dr. Leinenbach. See AR 385. Therefore, the ALJ  
3 sufficiently explained his reasons for discounting Plaintiff's symptom testimony, and the  
4 Court can meaningfully review the ALJ's reasoning. See *Kaufmann v. Kijakazi*, 32 F.4th  
5 843, 851–52 (9th Cir. 2022) (the Court considers "the ALJ's full explanation" when  
6 reviewing whether substantial evidence supports the ALJ's evaluation of the claimant's  
7 subjective testimony).

8       Plaintiff argues the ALJ improperly rejected Plaintiff's subjective testimony  
9 because "[n]one of the evidence cited by the ALJ actually contradicts [Plaintiff's] testimony  
10 about his limitations." Dkt. 14, at 9–10. Plaintiff provides no argument to support this  
11 assertion, and the Court finds no error in the ALJ's discussion of Plaintiff's testimony.

12       The ALJ found Plaintiff's statements to be "generally credible," "supported by the  
13 medical evidence of record," and "credible to the extent they support some level of  
14 functional limitations" but found Plaintiff was not limited "to the extent alleged by the  
15 claimant" and the evidence "do[es] not support his alleged inability to sustain fulltime work  
16 activity during the period at issue."<sup>4</sup> AR 383, 385–86. The ALJ cited medical evidence in  
17 the record showing Plaintiff had normal gait, normal muscle tone in his back, and normal  
18 movement and strength in his extremities despite his complaints of pain; could walk  
19 without assistance; and reported significantly reduced pain and improved mobility with  
20 treatment. AR 380–81.

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<sup>4</sup> Plaintiff argues the ALJ's findings are "not supported by substantial evidence in the record" and  
23 represent "another misapplication of the objective evidence test." Dkt. 14, at 10–11. For the  
reasons identified in this decision, the Court finds the ALJ did not err in evaluating Plaintiff's  
subjective testimony and substantial evidence supports the ALJ's reasoning.

1       The ALJ further cited medical findings showing Plaintiff had normal ability to  
2 communicate despite his hearing problems and reported significant improvement with  
3 hearing aids. AR 381–82.

4       This evidence conflicts with Plaintiff's allegations regarding the severity of his  
5 symptoms and limitations. Therefore, The ALJ sufficiently identified evidence that  
6 conflicts with Plaintiff's allegations regarding the severity of his symptoms and limitations,  
7 and the ALJ's reasoning was specific, clear, convincing, and supported by substantial  
8 evidence. See *Carmickle*, 533 F.3d at 1161 (an ALJ may reject subjective testimony upon  
9 finding it contradicted by or inconsistent with the medical record); see also *Smartt v.  
10 Kijakazi*, 53 F.4th 489, 498 (9th Cir. 2022) (“When objective medical evidence in the  
11 record is *inconsistent* with the claimant’s subjective testimony, the ALJ may indeed weigh  
12 it as undercutting such testimony.” (Emphasis in original)).

13       Plaintiff argues the ALJ improperly found Plaintiff's activities were inconsistent with  
14 Plaintiff's testimony. Dkt. 14, at 10. An ALJ may use evidence of a claimant's activities  
15 when evaluating their subjective symptom testimony to show inconsistency with the  
16 testimony or to show that the claimant's activities meet the threshold for transferable work  
17 skills. See *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Based on Plaintiff's hearing  
18 testimony, the ALJ found Plaintiff could clean the house, wash dishes, do some  
19 gardening, mow the law with a riding mower, drive himself, shop for himself, socialize with  
20 friends, and do online reading. AR 383. The ALJ determined this testimony did not support  
21 the extent of Plaintiff's alleged limitations. AR 383.

22       Plaintiff also testified he could not sit still in the car for a couple of hours, he  
23 experienced substantial back pain when carrying groceries in the house, he needed to

1 stop and rest when walking through the grocery store, riding the lawnmower “beats [him]  
 2 up pretty good,” he would not be able to stand for two to four hours, and he experienced  
 3 shoulder pain when doing household chores and yardwork. AR 42–45, 48–50. Plaintiff’s  
 4 activities are not reasonably consistent with Plaintiff’s allegations of back, shoulder, and  
 5 leg pain.

6 The Commissioner argues the ALJ properly discounted Plaintiff’s testimony based  
 7 on evidence that Plaintiff’s symptoms improved with treatment, and evidence of a gap in  
 8 Plaintiff’s medical treatment. Dkt. 16, at 4–5. Plaintiff argues his improvement with surgery  
 9 is not a convincing reason to reject his testimony about pain-related symptoms and  
 10 limitations he continued to experience after the surgery. Dkt. 21, at 3–4.

11 When evaluating a claimant’s testimony regarding the intensity or persistence of  
 12 their symptoms, the ALJ considers the effectiveness of treatment for relieving the  
 13 claimant’s pain or other symptoms. 20 C.F.R. § 404.1529(c)(3)(iv)–(v). The ALJ found  
 14 medical evidence “from the period at issue document[ed] improved symptoms and  
 15 increased function following the July 2015” surgery. AR 385. The ALJ cited medical  
 16 records showing Plaintiff reported significant improvement one week after receiving back  
 17 surgery in July 2015 and, although Plaintiff described some recurrent pain six weeks after  
 18 surgery, he reported his “left radicular pain was 50 to 80 percent of what it was before  
 19 surgery,” he was able to walk and stand better, and he was happy with the outcome.<sup>5</sup> AR  
 20 380–81, 384–85 (citing AR 249, 258). Noting a gap in treatment following Plaintiff’s

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21       <sup>5</sup> Plaintiff separately argues the ALJ inaccurately described the August 2015 treatment note, in  
 22 which Plaintiff reported “having recurrence of left radicular leg pain into the gluteal area, lateral  
 23 thigh and calf” and reported his “pain is now 50-80% of what it was before the surgery.” Dkt. 14,  
 at 7. After reviewing the medical opinion evidence, the Court finds the ALJ’s decision accurately  
 describes the August 2015 treatment note. See AR 384 (citing AR 249). Therefore, Plaintiff’s  
 argument is without merit.

1 surgery between late 2015 and early 2017, the ALJ found “the lack of medical treatment  
2 indicates that the claimant continued to see reduced symptoms from his back  
3 impairment.” AR 381.

4 Substantial evidence supports the ALJ’s findings. There are no medical records in  
5 the file from 2016, and Plaintiff’s medical records from 2017 show Plaintiff sought  
6 treatment primarily for flu symptoms, joint pain, hearing loss, and thyroid issues. See AR  
7 381, 296–300, 342–44, 347–48. Additionally, although Plaintiff continued to report some  
8 residual back pain, physical examinations in 2017 showed Plaintiff with normal  
9 musculoskeletal and neck range of motion, no spinal deformities, full muscle strength in  
10 his extremities, and normal muscle bulk and tone with some limited range of motion in his  
11 back and musculoskeletal tenderness. AR 279, 296–300. Therefore, the ALJ reasonably  
12 discounted Plaintiff’s testimony concerning the severity and limiting effects of his  
13 symptoms based on evidence Plaintiff’s symptoms improved with treatment, and the  
14 ALJ’s reasoning was specific, clear, convincing, and supported by substantial evidence.

15 Plaintiff argues the ALJ improperly rejected Plaintiff’s subjective testimony based  
16 on the lack of any opinion evidence describing greater limitations than Dr. Leinenbach  
17 and improperly based the RFC determination on “one selective medical assessment.”  
18 Dkt. 14, at 10–11. When assessing a claimant’s disability allegations, an ALJ considers  
19 the extent to which such allegations are consistent with the objective evidence and other  
20 evidence in the record, including medical opinion evidence. 20 C.F.R. § 404.1529(c); see  
21 *Carmickle*, 533 F.3d at 1161 (an ALJ may reject subjective testimony upon finding it  
22 contradicted by or inconsistent with the medical record).

23 Here, the ALJ considered all the relevant evidence of record, including the medical

1 opinion evidence, Plaintiff's medical records, and Plaintiff's subjective testimony, and  
2 found "no basis to reject the opinion of examining physician Dr. Leinenbach in favor of  
3 the claimant's subjective complaints of total disability." AR 385. As discussed above, the  
4 ALJ properly afforded "great weight" to Dr. Leinenbach's opinion and provided specific,  
5 clear, and convincing reasons supported by substantial evidence for discounting Plaintiff's  
6 subjective testimony. Plaintiff argues the ALJ "could have simply augmented Dr.  
7 Leinenbach's opinion with the additional pain-related limitations described by [Plaintiff]."  
8 Dkt. 14, at 10–11. However, limitations from properly discounted evidence does not need  
9 to be included in the RFC finding. See *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d  
10 685, 691–92 (9th Cir. 2009). Therefore, Plaintiff has not shown the ALJ erred when  
11 evaluating Plaintiff's subjective testimony or assessing the RFC.

12 Although the ALJ erred by finding Plaintiff's testimony inconsistent with evidence  
13 of Plaintiff's activities, the ALJ's error was harmless in this case. See *Stout*, 454 F.3d at  
14 1055 (an ALJ's error may be deemed harmless where it is "inconsequential to the ultimate  
15 nondisability determination"). As discussed above, the ALJ provided other valid reasons  
16 for discounting Plaintiff's subjective testimony, including by finding the testimony  
17 contradicted by objective medical findings, evidence Plaintiff's symptoms improved with  
18 treatment, and the medical opinion evidence. See *Bray v. Comm'r of Soc. Sec. Admin.*,  
19 554 F.3d 1219, 1227 (9th Cir. 2009) (if one of an ALJ's reasons for discounting a Plaintiff's  
20 testimony was erroneous, such error is harmless if the ALJ gave other valid independent  
21 reasons). Therefore, the ALJ's error was inconsequential to the nondisability  
22 determination.

### **3. RFC**

At step four, the ALJ must identify the claimant's functional limitations or restrictions and assess their work-related abilities on a function-by-function basis. See 20 C.F.R. § 404.1545; SSR 96-8p. The RFC is the most a claimant can do considering their limitations or restrictions. See SSR 96-8p. The ALJ must consider the limiting effects of all of the claimant's impairments, including those that are not severe, in assessing the RFC. 20 C.F.R. § 404.1545(e); SSR 96-8p.

Plaintiff argues the RFC “is legally erroneous and not supported by substantial evidence, as it does not include all of the limitations described by [Plaintiff].” Dkt. 14, at 14–15. Plaintiff further argues the ALJ erred by basing the step five finding on the ALJ’s erroneous RFC assessment. *Id.* As discussed above, the ALJ properly evaluated the evidence of record, including the medical opinion evidence, medical findings, and Plaintiff’s testimony, and “took into account limitations for which there was record support that did not depend on [Plaintiff’s] subjective complaints.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005). Therefore, Plaintiff has not shown the ALJ improperly assessed the RFC or erred by basing the step five finding on the ALJ’s RFC assessment.

## V. CONCLUSION

For the reasons set forth above, this matter is AFFIRMED.

DATED this 7<sup>th</sup> day of June, 2023.

Theresa L. Friske

**Theresa L. Fricke  
United States Magistrate Judge**